

U.S. DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS

**FILED**

**FEB - 9 2012**

CLERK, U.S. DISTRICT COURT  
by \_\_\_\_\_ Deputy

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

RICHARD B. BOWDEN, ET AL.,

Plaintiffs,

VS.

KATHRYN WILEMON, ET AL.,

Defendants.

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NO. 4:11-CV-711-A

MEMORANDUM OPINION

and

ORDER

Before the court for consideration and ruling are two motions to dismiss, the first by defendants City of Arlington ("City") and Kathryn Wilemon ("Wilemon") seeking dismissal for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted, and the other by defendant Etta Hulme ("Hulme") seeking dismissal for failure to state a claim upon which relief can be granted. After having considered such motions, the responses of plaintiffs, Richard B. Bowden and Susan Bowden (the "Bowdens"), the allegations of the complaint, and pertinent legal authorities, the court has concluded that all federal claims and causes of action asserted by the Bowdens should be dismissed with prejudice for failure to state a claim, and that all state-law claims asserted by the

Bowdens should be dismissed without prejudice pursuant to the authority of 28 U.S.C. § 1367(c)(3).<sup>1</sup>

I.

The Factual Allegations of, and Relief  
Sought by, the Complaint

The Bowdens alleged factually in their complaint that:

Wilemon is a member of the city council of City. Hulme is a homeowner in City, whose home is adjacent to the home in City of the Bowdens. The Bowdens constructed a retaining wall, replacing an earlier-failed wall, on the edge of their property on the side facing Hulme's property. The Bowdens obtained the necessary permit from City for construction of the wall, and after the wall was completed, City, upon inspection of the wall, approved the construction as being in compliance with City requirements.

Hulme was displeased with the wall both during its construction and after it was completed, and expressed her displeasure to City during and after completion of the construction. City's initial response was to inform Hulme of City's policy for permitted approval of engineered retaining walls, and then City informed Hulme that her dissatisfaction with

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<sup>1</sup>In a telephone conference conducted on February 8, 2012, with each party represented by counsel on the line, the court indicated that the court tentatively had decided to rule on the merits of state-law claims as well as the federal-law claims asserted by the Bowdens. Upon further review of the matter, the court has concluded that the wiser course would be for the court to decline to exercise jurisdiction over the state-law claims once the federal claims have been dismissed.

the wall was a civil matter between her and the Bowdens. In response to concerns expressed by Hulme after the wall was completed, a representative of City, Trey Yelverton ("Yelverton"), informed Hulme that, after having made appropriate inquiry and investigation, the conclusion had been reached that City was not in a position to take action to address her concerns. City's response, through Yelverton, did not satisfy Hulme.

In July 2007, Ed Dryden ("Dryden") of City informed Mr. Bowden, through his attorney, that he should have the wall evaluated by an engineer of Mr. Bowden's choice, and that "the validity of the engineer's design for the wall and the building permit that had been issued in 2006 would be deferred to the [City's] Building Code Board of Appeals at a hearing on November 1, 2007." Compl. at 6, ¶ 14. That hearing was held, and a second hearing was held before the same Board on April 25, 2008. Hulme complained to City that Dryden, who was the City official most directly involved in the retaining-wall matter, should not make the decision as to whether the Bowdens should be required to replace the newly constructed wall.

On May 20, 2008, the city council, at a work session, with the mayor presiding and the city manager present, discussed Hulme's complaints about the retaining wall. Yelverton and the

city attorney advised the council members that City could not demolish the wall and that Hulme and her neighbors, the Bowdens, would have to resolve their differences. Wilemon insisted that the wall must come down, although she admitted at one point that she did not know what she was talking about. City personnel made further inquiry concerning their authority to take any action in reference to the dispute between Hulme and the Bowdens, and sought and obtained from an independent engineering firm expert advice relative to the structural integrity and safety of the retaining wall. A copy of the engineering study done by that expert was sent to Mr. Bowden in March 2009.

In September 2009, City issued a notice (which amended a notice that had been given in July 2009) that on October 1, 2009, a hearing was to be held before the Municipal Court, referred to as the "Hearing Authority," at City's Municipal Court Building for the purpose of making "a determination as to whether a structure located [on the Bowdens' premises was] likely to endanger person or property in violation of law in accordance with, without limitation, Chapter 214 of the Texas Local Government Code, the Construction Chapter of the City Code of the City of Arlington, Texas, or other relevant law." Compl., Attach. 3 at 1. The Notice of Hearing explained that "[i]f the Hearing Authority finds that a structure is likely to endanger

persons or property, then the Hearing Authority may issue an order requiring the structure or structures on the property to be repaired or assess civil penalties within a time period to be set by the Hearing Authority" and that "[i]f the owner fails to comply and no other interest holder completes corrective action, then the City may impose a lien on the property." Id. The description in the Notice of Hearing contained mischaracterizations of parts of City's construction ordinance by substituting the words "retaining wall" for the word "building" three times.

The hearing was held as scheduled on October 1, 2009. The focus of the hearing, which lasted all day, was the expert testimony of licensed structural engineers retained by the parties, Renate Woods for City and Don Illingworth for the Bowdens. Municipal Court Judge Michael A. Smith presided.

On October 8, 2009, Judge Smith signed what he referred to as a "Proposed Order." Compl., Attach. 4 at 1, 10. He started out by noting that the hearing was conducted "pursuant to the Construction Chapter of the Code of Ordinances of the City of Arlington, Texas, the Texas Local Government Code Chapter 214, and other relevant law to determine whether the retaining wall structure . . . located at [the Bowdens' property] is likely to

endanger persons or property in its present condition and constitutes a dangerous building or structure." Id. at 1.

In his Proposed Order, Judge Smith reviewed in some detail the testimony of the experts, as well as testimony of a witness presented by City as to the estimated cost of demolishing the present wall and building a new wall in its place. After making his findings, Judge Smith concluded the Proposed Order with a declaration that "the Structure is not a dangerous building or structure." Id. at 10. That declaration was preceded by a conclusionary section, worded in its entirety as follows:

This Court's observations and decision should not in any way be seen as an endorsement of the wall in question. If the wall is in fact defective, the evidence that has been produced falls far short of proving it. The evidence in favor of condemning the wall as a dangerous structure is rendered unreliable by the errors outlined above. This Court finds that it would be unconscionable to use this evidence as the basis for subjecting the Owner to the kind of financial burden (\$50,000.00 by the estimate of the City's witness) involved in demolishing the wall and replacing it.

Id.

Judge Smith submitted his Proposed Order to the city council, but the city council has failed to comply with an ordinance of City that authorized the city council by City Council Resolution to adopt, in whole or in part, the Hearing Authority's order as its finding and order, or to amend, modify,

or reject the Hearing Authority's order.<sup>2</sup> City has not adopted the Proposed Order in whole or in part, nor has City amended, modified, or rejected it. City never removed the Bowdens' property from the list of properties with dangerous and substandard structures. The only action City has taken is that through a representative it executed on October 16, 2009, a release of Notice of Hearing, which was filed on October 20, 2009, with the Tarrant County Clerk. The mayor and city council of City have refused to adopt Judge Smith's Proposed Order. Even though the wall has, as of the date of the filing of the complaint, been subjected to the stress of extreme weather conditions, the wall has shown no sign of movement.

\* \* \* \* \*

The foregoing summarization of the factual allegations of the complaint fairly present the facts upon which plaintiffs base the seven counts for relief they put in their complaint. The counts, as stated in the complaint, are as follows:

**COUNT ONE - FEDERAL CLAIM FOR RELIEF**  
**AMENDMENT XIV, U.S. CONSTITUTION, DUE PROCESS AND EQUAL**  
**PROTECTION UNDER 42 U.S.C.A. § 1983**

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<sup>2</sup>The ordinance to which the Bowdens refer says that "[a] copy of the City Council Resolution shall be sent promptly by the Administrator by certified mail, return receipt requested, to the owner of the structure, owner of the property on which the structure is located, mortgagee, and lienholder." Compl., Attach. 2 at COA\_E0036.

. . . . .  
COUNT TWO - FEDERAL CLAIM FOR RELIEF  
CONSPIRACY TO INTERFERE WITH CIVIL RIGHTS - 42 U.S.C. § 1985

. . . . .  
COUNT THREE - STATE CAUSE OF ACTION  
VIOLATION OF BOWDENS' RIGHTS UNDER TEXAS CONSTITUTION AND DUE  
COURSE OF LAW

. . . . .  
COUNT FOUR - STATE CAUSE OF ACTION  
CLOUDING TITLE ON BOWDEN PROPERTY AND VIOLATION OF V.T.C.A., CIVIL  
PRACTICE & REMEDIES CODE §12.001 AND FOLLOWING

. . . . .  
COUNT FIVE - STATE CLAIM FOR RELIEF  
INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

. . . . .  
COUNT SIX - STATE CAUSE OF ACTION  
PETITION FOR DECLARATORY JUDGMENT

. . . . .  
COUNT SEVEN - FEDERAL CLAIM FOR RELIEF  
DECLARATORY JUDGMENT AND INJUNCTION

Compl. at 14, 16-21.

The Bowdens seek compensatory damages against all defendants under all state and federal causes of action; declaratory judgment and permanent injunction as to City; relief and damages against all defendants under sections 12.002 and 12.003 of the Texas Civil Practice and Remedies Code; punitive damages to punish all defendants for their constitutional and other



violations alleged in the complaint and to deter other individuals and government entities from such violations in the future; an award of costs, expenses, and reasonable attorney's fees pursuant to 42 U.S.C. § 1988 and other federal and state law; and, prejudgment interest.

## II.

### Applicable Standards

The court has concluded that it need not rule on the motion of City and Wilemon seeking dismissal for lack of subject matter jurisdiction, and that the appropriate course is to base the court's rulings as to the Bowdens' federal-law claims on the motions to dismiss for failure to state a claim upon which relief can be granted. The court is taking this approach because of the rule adopted by the Fifth Circuit that "where the factual and jurisdictional issues are completely intermeshed the jurisdictional issue should be referred to the merits, for it is impossible to decide the one without the other." McBeath v. Inter-Am. Citizens for Decency Comm., 374 F.2d 359, 363 (5th Cir. 1967). See also, Continental Cas. Co. v. Dep't of Highways, State of La., 379 F.2d 673, 675 (5th Cir. 1967). Thus, the court is guided in its rulings on all defense motions by the standards that govern the evaluation and ruling of the court on a motion to dismiss for failure to state a claim.

Rule 8(a)(2) of the Federal Rules of Civil Procedure provides, in a general way, the applicable standard of pleading. It requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), "in order to give the defendant fair notice of what the claim is and the grounds upon which it rests," Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal quotation marks and ellipsis omitted). Although a complaint need not contain detailed factual allegations, the "showing" contemplated by Rule 8 requires the plaintiff to do more than simply allege legal conclusions or recite the elements of a cause of action. Id. & n.3. Thus, while a court must accept all of the factual allegations in the complaint as true, it need not credit bare legal conclusions that are unsupported by any factual underpinnings. See Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1950 (2009) ("While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.")

Moreover, to survive a motion to dismiss for failure to state a claim, the facts pleaded must allow the court to infer that the plaintiff's right to relief is plausible. Id. To allege a plausible right to relief, the facts pleaded must suggest liability; allegations that are merely consistent with

unlawful conduct are insufficient. Id. at 1249 (citing Twombly, 550 U.S. at 557). "Determining whether a complaint states a plausible claim for relief . . . [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. at 1950.

### III.

#### Analysis

##### A. Federal-Law Claims

The Bowdens characterize the claims they assert in Counts One, Two, and Seven as federal claims for relief. The court has concluded that the facts alleged in the complaint, even if accepted as true, would not support a conclusion that any defendant has engaged in any conduct that would give rise to a cause of action under 42 U.S.C. §§ 1983 or 1985 or that would support the grant of any declaratory or injunctive relief under federal law.

The Bowdens' allegations of federal-law claims against City failed to satisfy the plausibility standards of Twombly and Iqbal. When the conclusory allegations, and those that are pure characterizations, in the complaint are weeded out, the factual allegations that remain suggest no more than that City was doing its best to accommodate the conflicting views and interests of its quarreling citizens, finally by arranging for a hearing that

provided due process to the Bowdens and a forum for the positions of both neighbors to be heard and considered.

As to Count One, no facts are alleged that would support a reasonable inference that City denied the Bowdens the due process or equal protection to which they are entitled under the United States Constitution. They were given due notice of the October 1, 2009 hearing, and they were afforded the opportunity at the hearing to offer evidence and present argument, through legal counsel, in support of their position in respect to the integrity of their retaining wall. The Bowdens can have no complaint with the hearing officer's conclusions or the declaration of the hearing officer that the retaining wall is not a dangerous building or structure.

The court notes that for an equal protection claim there must be a factual allegation that others similarly situated were treated differently. Vill. of Willowbrook v. Olech, 528 U.S. 562 (2000) (per curiam). See also Purze v. Vill. of Winthrop Harbor, 286 F.3d 452, 455 (7th Cir. 2002) (holding that in order to be considered "similarly situated," comparators must be "prima facie identical in all relevant respects."). A mere error in judgment will not support a claim of equal protection discrimination. See Sunday Lake Iron Co. v. Twp. of Wakefield, 247 U.S. 350, 353 (1918). The good faith of government officials is presumed, and

the burden of proof of establishing lack of good faith is upon the complaining party. Id. There are no allegations in the complaint from which the court could reasonably conclude that City was not acting in good faith in respect to all of the events described in the complaint. As to the alleged violations of due process, the court notes that procedural due process requires a notice and opportunity to be heard. See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546 (1985). The Bowdens were afforded due process by City--they received notice of a hearing affecting their rights as to the retaining wall, and they participated in the hearing. There is no allegation that the notice was not sufficient from a due process standpoint<sup>3</sup> or that their opportunity to be heard was not adequate.

Therefore, the complaint does not state a claim for relief under 42 U.S.C. § 1983 against City that is plausible on its face. The Bowdens have failed to plead factual content that would allow the court to draw the reasonable inference that City has committed constitutional violations against the Bowdens. Thus, the Count One allegations must be dismissed as to City.

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<sup>3</sup> To whatever extent the Bowdens might be relying on the allegations they make in paragraphs 51 and 52 of their complaint, Compl. at 18, ¶¶ 51 and 52, in support of a contention that they did not receive fair notice of the October 1, 2009 hearing, such a contention would border on frivolousness. Even if the City officials did misquote a part of one of its ordinances and failed to adequately explain the ordinance, when the allegations of the complaint and its attachments are considered in their entirety, there is no room for a plausible contention that the Bowdens were misled as to the nature of the controversy or the matter to be heard.

For basically the same reasons, the Count Two claims must be dismissed as to City. No reasonable inference can be drawn from the factual, as opposed to conclusory, allegations of the complaint that City engaged in any conduct that would cause it to be liable to plaintiffs under the authority of 42 U.S.C. § 1985.

Count Seven requests declaratory relief against City and, in a general way, a permanent injunction, referring back to the allegations in Count Six pertaining to City's inaction in reference to Judge Smith's Proposed Order. No facts are alleged in the complaint that would justify any relief under Count Seven under federal law.

Apparently Wilemon, individually and in her official capacity as a member of the city council, is the target of each of the Bowdens' federal claims in one or both of those capacities. The court is not giving any effect to the claims against Wilemon in her official capacity inasmuch as the official-capacity claims are to be treated as claims against City. See Ky. v. Graham, 473 U.S. 159, 166 (1985).

The pleadings are so facially inadequate as to the Bowdens' federal claims against Wilemon that the court is not required to

devote significant time or attention to a discussion of those claims. The only specific facts alleged as to the conduct of Wilemon is that, in her capacity as a city councilwoman, she said at a meeting of the city council that "I don't even know what I'm talking about," and "continued to insist that the 'existing wall has to come down.'" Compl. at 7, ¶ 17. The conclusion, according to the allegations of the complaint, the Bowdens reached from that conduct was that "Wilemon's ignorant, unfounded, and presumptuous comment indicated a bias in favor of Hulme and against the Bowdens, since it was without basis in fact or law." Id.

All other mentions of Wilemon in the complaint are in the form of purely conclusory allegations and characterizations. Id. at 2-3, ¶¶ 3-5; 4, ¶ 10; 7, ¶ 18; 15-17, ¶¶ 43, 45-47, 49; 19, ¶ 54; 21, ¶ 63. The complaint does not plead enough facts concerning Wilemon "to state a claim to relief that is plausible on its face." See Iqbal, 129 S. Ct. at 1949 (quoting Twombly, 550 U.S. at 570). The complaint does not plead "factual content that allows the court to draw the reasonable inference that [Wilemon] is liable for the misconduct alleged." Iqbal, 129 S. Ct. at 1949. The "factual allegations [against Wilemon are not] enough to raise a right to relief above the speculative level." Twombly, 550 U.S. at 555. The court is not aware of any

authority that would support a federal claim against Wilemon based on a stray comment about her of lack of knowledge as to what she was talking about.

Nor would the facts alleged by the Bowdens support a theory of recovery under federal law against Hulme. No facts are alleged that would lead to the conclusion that she was a state actor, engaging in state action, or that she engaged in any kind of conduct that would cause her to be liable to the Bowdens under either 42 U.S.C. § 1983 or § 1985.

B. The State-Law Claims

The court has jurisdiction over the Bowdens' state-law claims by virtue of the provisions of 28 U.S.C. § 1367(a). Section 1367(c)(3) provides that "[t]he district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if . . . the district court has dismissed all claims over which it has original jurisdiction." Inasmuch as the court has concluded to dismiss all the federal-law claims that originally provided this court's jurisdiction, the court has concluded to exercise its discretion to no longer recognize supplemental jurisdiction over the state-law claims.



IV.

Order

For the reasons stated above,

The court ORDERS that:

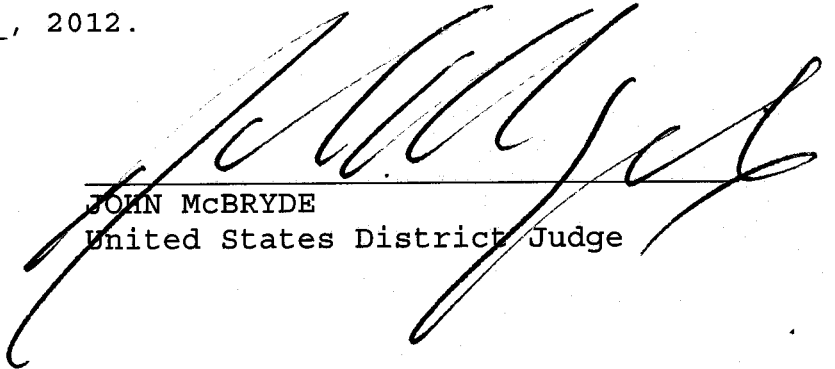
(1) the motions to dismiss of all defendants for failure to state a claim upon which relief may be granted be, and are hereby, granted as to all claims and causes of action of the Bowdens arising under the Constitution, or any law, of the United States, including all claims and causes of action asserted on the basis of sections 1983, 1985, or 1988 of Title 42 of the United States Code;

(2) all claims and causes of action asserted by the Bowdens against City, Wilemon, or Hulme arising under the Constitution, or any law, of the United States, including all claims and causes of action asserted on the basis of sections 1983, 1985, or 1988 of Title 42 of the United States Code, be, and are hereby, dismissed with prejudice; and

(3) all claims and causes of action asserted by the Bowdens against City, Wilemon, or Hulme under the constitution, or any law, of the State of Texas be, and are hereby, dismissed without

prejudice by reason of the exercise by the court of the  
discretion it has under 28 U.S.C. § 1367(c)(3).

SIGNED February 9, 2012.



JOHN MCBRYDE  
United States District Judge